

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

AMER SULIEMAN,

Plaintiff,

JEBARA IGBARA, JOUMANA DANOUN, AND
MOTASHEM KHALIL

Defendants

1:20-cv-6032

**DEFENDANT MOTASEM
KHALIL'S MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO DISMISS THE
AMENDED COMPLAINT PURSUANT TO
F.R.C.P. RULES 12(b)(6) & 9(b)**

**DEFENDANT MOTASEM KHALIL'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS THE AMENDED COMPLAINT PURSUANT TO F.R.C.P.
RULES 12(b)(6) & 9(b)**

Respectfully Submitted,
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This motion seeks to dismiss the Amended Complaint (Dk 13) as alleged against defendant MOTASEM KHALIL (hereinafter, “Khalil”), because the allegations cannot support the requirements under F.R.C.P. Rule 9(b). This motion was filed pursuant to a docket order entered by this Court following a second letter motion to dismiss. This Memorandum of Law is made in support of Khalil’s Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and requests that all causes of action against him be dismissed with prejudice.

STANDARD OF REVIEW ON A MOTION TO DISMISS

On a motion to dismiss pursuant to F.R.C.P. Rule 12 (b)(6), the Court will accept as true all claims raised in the complaint, drawing all reasonable inferences in favor of the party against whom dismissal is sought. Grandon v. Merrill Lynch & Co., 147 F.3d 184, 188 (2d Cir.1998). At the same time, legal conclusions and threadbare recitals of the elements of a cause of action that are supported by mere conclusory statements, do not suffice. Harris v. Mill, 572 F.3d 66, 72 (2d Cir. 2009). “Only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Ashcroft v. Iqbal, 556 U.S. 662 (2009) (Internal citations omitted.)

Complaints sounding in fraud are subject to a heightened pleading requirement under FRCP Rule 9(b), which states in full: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.” The rule is satisfied only when the complaint

1 specifies the “time, place, speaker, and content of the alleged misrepresentations”, how the
2 misrepresentations were fraudulent, and the details that give rise to a strong inference that the
3 defendant had an intent to defraud, knowledge of the falsity or a reckless disregard for the truth.
4
5 Cohen v. S.A.C. Trading Corp., 711 F.3d 353, 359 (2d. Cir. 2013).

6

7 ARGUMENT

8

9 Point I

10 **The Amended Complaint Must Be Dismissed, Because It Fails To State a Claim Under New** 11 **York Law**

12 As this Court’s jurisdiction is premised upon diversity of citizenship, the substantive law of New
13 York regarding fraud is controlling. In New York, it is well-settled that a fraud claim cannot
14 arise solely out of a breach of contract. “A cause of action for fraud does not arise when the only
15 fraud charged relates to a breach of contract. To plead a viable cause of action for fraud arising
16 out of a contractual relationship, the plaintiff must allege a breach of duty which is collateral or
17 extraneous to the contract between the parties.” Krantz v. Chateau Stores of Canada, Ltd., 256
18 A.D.2d 186 (1st Dept. 1998) (Internal citations omitted.) In that case, plaintiff alleged that
19 defendant providing him with a false financial statement, which incorrectly lowered the monies
20 owed to plaintiff under their contract, amounting to fraud. The Court held that was solely limited
21 to the realm of breach of contract, as the breach of contract in failing to provide the correct
22 payment to plaintiff was not a breach that was “collateral or extraneous to the parties contract”
23 but was instead, the entire point of it. Id.

24
25 Here, it is clear that the allegations relate entirely to the breach of an oral contract, as
26 demonstrated by the breach of contract cause of action, and no extraneous or collateral duties are
27 alleged to be owed to plaintiff by Igbara or Khalil. There is no allegation that this one loan was

1 the product of a longer conspiracy, as no damages are alleged based on the prior dealings
2 between plaintiff and Igbara. Nor is there any allegation of any performance by Igbara owed to
3 plaintiff beyond simply paying back the loan within 48 hours - not even interest is alleged to be
4 owed. The allegations that both Igbara and Khalil provided checks to plaintiff that were later not
5 honored, fits under the same category as the breach of contract claim in Krantz, infra. Plaintiff
6 simply and straightforwardly alleges facts tending to show a breach of contract by Igbara, in that
7 he failed to pay back the loan to him, which was the entire point of the alleged contract. There is
8 no allegation of any collateral or extraneous breach of duty that occurred.
9

10 At bottom, Igbara is alleged to have taken a loan and then failed to pay it back when required,
11 analogous to the thousands of credit card lawsuits filed against debtors filed every day. Under
12 New York law, failing to pay a credit card on time cannot become a fraud claim if the debtor's
13 check bounces, even if the debtor *knew* the check would be dishonored. The same underlying
14 principle applies to the case at bar.
15

16 Point II
17

18 **The Amended Complaint Must Be Dismissed, Because It Fails To Allege that Khalil Had**
19 **Actual Knowledge of the Fraud**

20 Khalil's lack of involvement in plaintiff's decision to loan Igbara the money is conceded by
21 plaintiff not including Khalil in the cause of action for breach of contract. Khalil was not alleged
22 to have been involved in plaintiff's decision to loan Igbara the cash, according to the complaint's
23 four corners - his name is only even mentioned in connection with the checks and the Instagram
24 videos. This is because it is obvious that there was no contract with Khalil, nor did plaintiff rely
25 upon Khalil in any manner in reaching his decision to loan the money.
26

27 It is only after the loan was complete that Khalil was alleged to have done anything, which was
28 related to issuing a check to plaintiff (Am Com. ¶15). At best, Khalil is alleged to have aided and

1 abetted in the fraud *after* it occurred, when the entire amount of the loan was already placed with
2 Igbara. (Am Com ¶17), first at some unspecified time after the loan, and then over a year later, in
3 October 2020. Khalil is not alleged to have induced plaintiff to continue to loan Igbara money;
4 instead, he is alleged to have “pushed] plaintiff off to a later date.” In support of this quasi aiding
5 and abetting fraud, it is alleged that Khalil texted plaintiff in response to his entreaties for
6 money, “He [Igbara] leavin tonight to Maryland” and “He will be back Monday - Tuesday I got
7 you when I come back.” (Am Com ¶19-21).

9 However, these statements all occurred well after the fraud was complete, and could only have
10 the effect, if true, to stave off this lawsuit, which eventually of course came about in any event.
11

12 There is no allegation that plaintiff loaned Igbara or Khalil even more money after the initial
13 amount, or took any action at all in response to the text messages and two bounced checks, other
14 than continue to demand repayment of the loan. The allegation that Khalil and Igbara had the
15 same “motivation” to lie to plaintiff is meaningless without any facts alleging or tending to show
16 that Khalil actually had knowledge of and intended to defraud plaintiff, of which there are none.
17

18 This is especially true when the timing of these texts was over a year after the loan was due, as it
19 was due to be repaid in 48 hours, according to plaintiff. (Am Com ¶46). The fact is that plaintiff
20 was already well aware that Igbara did not pay him back within 48 hours.

21 Even if assuming *arguendo* that the Court accepts that Khalil lied in the text messages, and that
22 lying caused plaintiff to forego a vague “enforcement” mechanism, this at best only states a
23 claim for aiding and abetting fraud after the fact, not fraud as is attempted to be pled in the
24 Complaint.

26 To the extent that the Amended Complaint can be construed to allege a cause of action for aiding
27 and abetting fraud against Khalil, it must likewise be dismissed, because aiding and abetting
28

1 fraud still requires knowledge and intent to induce, which is not pled here.

2 The elements for aiding and abetting fraud are summarized as follows:

3 **To plausibly state a claim premised on aiding and abetting, New York**
4 **law requires the plaintiff to "allege (i) the existence of a violation by**
5 **the primary wrongdoer; (ii) knowledge of the violation by the aider**
6 **and abettor; and (iii) proof that the aider and abettor substantially**
7 **assisted in the primary wrong."** Agape I, 681 F. Supp. 2d 352, 362
8 (E.D.N.Y.2010) (citing Armstrong v. McAlpin, 699 F.2d 79, 91 (2d
9 Cir.1983)). These claims are also subject to the heightened pleading
10 requirement of Federal Rule of Civil Procedure 9(b) ("Rule 9(b)"), which
11 provides that "[i]n all averments of fraud or mistake, the circumstances
12 constituting fraud or mistake shall be stated with particularity." Fed.
13 R.Civ.P. 9(b). Rule 9(b) applies equally to claims alleging aiding and
14 abetting fraud, Armstrong, 699 F.2d at 92-93, aiding and abetting breach
of fiduciary duty sounding in fraud, Kolbeck v. LIT America, Inc., 939 F.
Supp. 240, 245 (S.D.N.Y.1996), and aiding and abetting conversion
premised on fraud, Daly v. Castro Llanes, 30 F. Supp. 2d 407, 414
(S.D.N.Y.1998). Accordingly, "[a] plaintiff alleging aiding and abetting
claims sounding in fraud must also plead the elements of aiding and
abetting with particularity."

15 In re Agape, 773 F. Supp. 2d 298 (E.D.N.Y 2011)

17
18 Here, there is no proof or allegation that Khalil "substantially assisted" in the fraud
19 because he is not alleged to have induced plaintiff into it, in any manner. He is not alleged to
20 have led any kind of "fraudulent persona" to induce plaintiff into the fraud, as was alleged
21 against Igbara in ¶5. He is also not alleged to have had knowledge of the fraud prior to its taking
22 place, other than well past the time when the oral loan contract was breached, which was 48
23 hours after August 30, 2019 according to the Complaint. (Am Com ¶5 and ¶46).

25
26 Point III

27 The Cause of Action for Unjust Enrichment Must be Dismissed

1 Count III of the Amended Complaint asserts unjust enrichment against all defendants,
2 although nothing was changed from the original complaint. To succeed on a claim for
3 unjust enrichment under New York law, a plaintiff must prove that: 1) defendant was
4 enriched, 2) at plaintiff's expense, and 3) equity and good conscious militate against
5 permitting defendant to retain what plaintiff is seeking to recover." Diesel Props S.r.l. v.
6 Greystone Bus. Credit II LLC, 631 F.3d 42, 55 (2d Cir. 2004). However, when a matter is
7 controlled by contract, the plaintiff has no valid claim for unjust enrichment. Marshall v.
8 Hyundai Motor Am., 51 F. Supp. 3d 452, 471 (S.D.N.Y. 2014). The theory of unjust
9 enrichment "is an obligation the law creates in the absence of an agreement." Goldman v.
10 Metropolitan Life Insurance Co., 5 N.Y.3d 561, 572 (2005).]

13 When applying the elements to the allegations against Khalil, it is clear no such cause of
14 action can be asserted against him. **Nowhere is it alleged that Khalil received any**
15 **property from Plaintiff or was otherwise enriched by him, thereby failing to allege**
16 **the central element of this cause of action against Khalil.** Nor are any specifics offered
17 as to the amount enriched, and how this enrichment was made at Plaintiff's expense.
18 Given this, the assertion of unjust enrichment is duplicative and without legal support
19 and must be dismissed for failing to state a claim.

21 Point IV
22

23 **Plaintiff's Claim for Conversion Cannot be Maintained Because Khalil Did Not**
24 **Obtain Possession over Plaintiff's Property, and Damages are Based in Contract,**
25 **not Tort.**

26 Plaintiff's fourth claim against Defendant Khalil is for the tort of conversion. The New
27 York Court of Appeals has stated that the two elements of conversion are: 1) plaintiff's
28 possessory right or interest in certain property and 2) defendant's dominion over the

1 property or interference with it in derogation of plaintiff's rights. Colavito v. N.Y. Organ
2 Donor Network, Inc., 8 N.Y.3d 43, 50 (2006). Here, Plaintiff fails to even allege, let
3 alone demonstrate, the second element that Defendant Khalil intentionally asserted
4 dominion and control over the monies constituting the loan extended to Defendant
5 Igbara, or any other monies for that matter. The Complaint fails to allege with any degree
6 of particularity that Defendant Khalil asserted control or even interfered with Plaintiff's
7 possession of any monies that were owed to him by Igbara, nor does it allege that Khalil
8 had any dominion over any of Plaintiff's property. Rather, the only allegations as to such
9 control are squarely directed towards Defendant Igbara. Indeed, Khalil's name is not
10 mentioned at all in the paragraphs setting forth that cause of action.

11 Additionally, similar to a claim for unjust enrichment, Plaintiff cannot maintain an action
12 for conversion where damages are merely sought for breach of contract. ESI, Inc. v.
13 Coastal Power Prod. Co., 995 F. Supp. 419 ,433 (S.D.N.Y. 1998), which is clearly the
14 case here, as Plaintiff himself terms the money he gave to Igbara as a "loan." As such,
15 the cause of action for conversion as to Khalil should be dismissed.

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19 Point V

20 **Plaintiff's Claim for Accounting Cannot be Maintained because Damages are Based**
21 **in Contract, not Tort.**

22 Finally, Plaintiff alleges a cause of action for "accounting" against "all
23 defendants", although Khalil is not named in the two paragraphs of the Amended
24 Complaint pertaining to this cause of action. (Nor was it changed from the original
25 complaint.)

26 Given there is no allegation that Khalil actually took, accepted or utilized any of
27 Plaintiff's money, he does not and cannot provide for any accounting. Moreover, this
28

1 claim is duplicative of the breach of contract claims as they “arise out of the same
2 facts...and do not allege any distinct damages.” Netjets v. LHC Comm, 537 F3d 168, 175
3 (2d Cir. 2008). “[I]f a plaintiff can prove an enforceable contract and the plaintiff’s
4 account stated claim seeks the same relief as its breach of contract claim, the account
5 stated claim may be dismissed as duplicative.” OOCL USA Inc. v. Transco Shipping,
6 No. 13-CV-5418, 2015 WL 9460565, at *6 (S.D.N.Y. Dec. 23, 2015). It is clear here that
7 no separate claims and damages are alleged in relation to this cause of action, meaning it
8 is duplicative to the breach of contract claim only asserted against Igbara and it should be
9 dismissed against Khalil.

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12 **WHEREFORE**, it is respectfully requested that the Court grant the motion and
13 the relief requested, issuing an order and judgment dismissing the Amended Complaint
14 as to MOTASEM KHALIL, with prejudice.

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17 Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, I caused a true and correct copy of the above and in Support of defendant Khalil's Motion to Dismiss to be served via email and U.S. Mail on:

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